STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC WESTBROOK,

Defendant-Appellant.

UNPUBLISHED
September 30, 2003

No. 236357
Wayne Circuit Court
LC No. 00-003415

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 50 grams or more, but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii), and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to concurrent prison terms of ten to twenty years for the possession of cocaine conviction, and nine months to five years for the felon in possession conviction. He appeals as of right. We affirm.

I. Facts

On February 29, 2000, the police executed a search warrant on defendant's Detroit home and seized cocaine, marijuana, a digital scale, and two loaded firearms. Several Detroit police officers testified that they went to defendant's house to execute a search warrant. After announcing their presence and receiving no response, the officers effectuated a forced entry. Defendant's front entrance was protected by two sets of iron security grates.

The police discovered defendant in a first-floor bedroom, standing on top of a dresser, attempting to place a "clear bag of suspected narcotics" into a drop ceiling panel. At that time, the police observed, and subsequently removed, a loaded, blue steel nine-millimeter semiautomatic handgun from defendant's waistband. In the ceiling panel, the police discovered two separate plastic bags, containing a total of 69.88 grams of cocaine. The police also seized 1,885.5 grams of marijuana from the bedroom closet, and a loaded assault rifle from behind the bedroom entry door. A digital scale and a female bulletproof vest were also confiscated from the living/dining room area. The arresting officer testified that when defendant twice resisted arrest, he sprayed defendant in the "nose area" with "department-issue pepper spray" and handcuffed

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

him. The officer then removed $1,224 from defendant's pocket, and keys that opened the front door and one of the security grates.

During trial, the defense maintained that the police were simply dishonest, and that defendant was innocent of the charges. The defense also alleged that defendant was a victim of police brutality. A defense witness, who was in another room during the search, testified that he saw defendant handcuffed, smelled mace, and heard the police hitting defendant and defendant hollering. A police officer rebuttal witness, who was present during the execution of the search warrant, denied that defendant was ever hit, threatened, or otherwise abused.

II. Search Warrant

Defendant argues that the trial court erred by finding that the magistrate had probable cause to issue a search warrant for his home. As such, defendant contends that the trial court improperly denied his motion to suppress the evidence seized under the search warrant. Specifically, defendant maintains that the search warrant affidavit contained unreliable information from an incredible confidential informant and, therefore, was insufficient to establish probable cause of criminal activity. We disagree.

We review a trial court's factual findings on a motion to suppress for clear error.[1] "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo."[2] Clear error exists when this Court is left with a firm and definite conviction that a mistake was made.[3]

A search warrant may not be issued absent probable cause to justify the search.[4] "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place."[5] A magistrate's findings of probable cause in this regard shall be based upon all the facts related within the affidavit.[6] A reviewing court should read the underlying affidavit in a "common sense and realistic manner" and, giving due deference to the magistrate's decision, determine if there was a substantial basis for the finding of probable cause.[7]

The underlying affidavit may be based on information supplied to an affiant by a confidential informant if the affidavit contains "affirmative allegations from which the

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[1] *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001).

[2] *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

[3] *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

[4] US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651.

[5] *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000); quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992).

[6] MCL 780.653; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001).

[7] *Russo, supra* at 603-604.

magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable."[8] Personal knowledge should be derived from the information provided and not merely from a recitation that the informant had personal knowledge.[9] But "[i]f personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge."[10]

The affidavit in this case provided sufficient facts from which a magistrate could find that the confidential informant's information was based on personal knowledge. The affiant police officer stated that the confidential informant provided information that defendant lived at a specific address, that he had purchased cocaine from defendant in the past, that defendant has "bulk cocaine and sells only ounces or above," and that defendant has a trained attack dog to guard narcotics stored in his basement. From these facts, the magistrate could have reasonably concluded that the confidential informant's information, in particular the location of the residence and the location and quantity of the drugs defendant sold, was sufficient evidence to infer personal knowledge.[11]

The record also presents sufficient facts to support the reliability of the confidential informant's information. The affiant police officer in this case conducted an independent surveillance of the address to verify the informant's statement that defendant lived at the location. During two days of surveillance, the affiant police officer personally observed several vehicles arrive at defendant's residence. The occupants of these vehicles would enter defendant's home and leave within ten minutes. The officer also saw some of these individuals return to their vehicles carrying small bags or satchels. Based on his experience in more than three hundred "drug raids" and the activity he observed, the affiant police officer stated that he believed that illegal drug trafficking was being conducted at the residence in question. An independent police investigation that verifies information provided by an informant can support the issuance of a search warrant.[12] An affiant's experience is also relevant in the establishment of probable cause.[13] We further note that the informant's admission that he purchased illegal drugs from defendant at that address creates high indicia of reliability because it is a statement against penal interest.[14]

Considering these facts "in a common-sense and realistic manner," we hold that the magistrate had a substantial basis for finding that probable cause existed to believe that controlled substances would be found at defendant's home. Thus, the search warrant was valid and the trial court did not err by denying defendant's motion to suppress on this basis.

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[8] MCL 780.653(b); see *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992).

[9] *Stumpf, supra* at 223.

[10] *Id.*

[11] *Id.*

[12] *Id.*; *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991).

[13] *Ulman, supra* at 509.

[14] See *In re Forfeiture of $28,088*, 172 Mich App 200, 207; 431 NW2d 437 (1988).

III. Knock-and-Announce

Defendant next asserts that the trial court erroneously denied his motion to suppress the evidence seized pursuant to the search warrant because the police officers violated the knock-and-announce statute, MCL 780.656. Specifically, he challenges the trial court's holding that the inevitable discovery exception precludes suppression of the evidence. We disagree.

In *People v Vasquez*[15] and *People v Stevens*,[16] our Supreme Court held that a violation of the knock-and-announce requirement was subject to the inevitable discovery exception. Defendant relies, however, on the Sixth Circuit Court of Appeals' decision in *United States v Dice*,[17] which held that suppression of evidence is the constitutionally mandated remedy in this situation. Nevertheless, in *People v Hudson*,[18] our Supreme Court, while acknowledging the *Dice* decision, reaffirmed its decisions in *Stevens* and *Vasquez*. We are bound to follow the decisions of our Supreme Court.[19]

IV. Prosecutorial Misconduct

Defendant raises several instances of alleged prosecutorial misconduct that he claims denied him a fair trial. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[20] To the extent a defendant fails to object to any alleged misconduct, our review is limited to plain error affecting his substantial rights.[21] "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."[22]

Defendant initially argues that the prosecutor impermissibly argued facts not in evidence when he stated, in essence, that defendant purchased security grates to keep rival drug dealers away. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence.[23] But a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case.[24] Further, a prosecutor may use "hard language" when it is supported by the evidence, and is not required to phrase arguments and inferences in the blandest possible terms.[25] Here, there was evidence that defendant had two iron security

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[15] *People v Vasquez (After Remand)*, 461 Mich 235, 241-242; 602 NW2d 376 (1999).

[16] *People v Stevens (After Remand)*, 460 Mich 626, 645-647; 597 NW2d 53 (1999).

[17] *United States v Dice*, 200 F3d 978 (CA 6, 2000).

[18] *People v Hudson*, 465 Mich 929, 932; 639 NW2d 255 (2001).

[19] *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

[20] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[21] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[22] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[23] *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

[24] *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

[25] *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

grates on the outside of his home. There was also evidence that the police seized a large quantity of cocaine and marijuana from inside defendant's residence. The prosecutor's argument that the security equipment was used to protect defendant's possessions, including the narcotics, was thus a reasonable inference based on the evidence.

Defendant next contends that the prosecutor argued facts not in evidence when he stated that "officers are entitled to search anyone that they arrest for their own safety, as well as for evidence." Defendant does not assert that the prosecutor's comment was a misstatement of the law, and the basis of his challenge is unclear. In any event, there was evidence that defendant was searched subsequent to his arrest and there was no claim that this search was unlawful. The trial court further instructed the jury that the lawyers' comments were not evidence and that they should follow the law as provided by the court.[26] Juries are presumed to follow their instructions.[27]

We similarly reject defendant's claim that the prosecutor's comments regarding the use of pepper spray were improper. It is apparent from the record that the prosecutor was simply refuting defense counsel's proposition during closing argument that the officer improperly maced defendant, instead of first enlisting the assistance of other officers to subdue defendant.[28] Further, the prosecutor, noting that he may be incorrect, subsequently proposed that the police are allowed to use mace specifically because it does not cause permanent damage, and prevents officers from having to physically control an individual.

Defendant next maintains that he is entitled to a new trial because the prosecutor improperly vouched for the police officers' credibility. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant's guilt.[29] The prosecutor's statement in the instant case that the police officers provided honest and truthful testimony was clearly improper. No error requiring reversal occurred, however, because the trial court sustained defense counsel's objection and defendant failed to request a curative instruction.[30] Moreover, the prosecutor later explained to the jury that it could infer that the police officers were credible based on the evidence presented and not on his opinion.[31] We further note that the trial court's instructions to the jury that they were the sole judges of witness

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[26] *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001).

[27] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[28] See *Schutte, supra* at 721 (noting that otherwise improper prosecutorial remarks may not require reversal if they address issues raised by defense counsel).

[29] *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

[30] *Schutte, supra* at 721-722.

[31] See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (holding that the prosecution may properly argue from the evidence that a witness is worthy of belief); see also *Long, supra* at 587-588

credibility and that they should not give special weight to witnesses based simply on their status as police officers cured any potential prejudice.[32]

We also find no merit to defendant's claim that the prosecutor denigrated defense counsel. Although it is improper for the prosecution to personally attack the credibility of defense counsel, in this case the prosecution's argument did not involve such an attack.[33] Rather, the record reflects that the prosecutor was simply explaining why he chose to present a rebuttal witness.

To the extent defendant claims that the prosecution improperly shifted the burden of proof to defendant by stating that it was undisputed that defendant possessed $1,224, we disagree. While a prosecutor may not imply that a defendant must prove something, it is permissible for a prosecutor to observe that evidence against a defendant is undisputed.[34] Here, not only was there undisputed evidence regarding the amount of money seized from defendant, but the defense actually stipulated to this fact at trial.

Because defendant failed to present any instances of prosecutorial misconduct that denied him a fair trial, he has not shown that his trial counsel was ineffective for failing to object. An ineffective assistance of counsel claim requires a defendant to show that his counsel's performance prejudiced him to the extent that but for counsel's error there was a reasonable probability that the result of the proceedings would have been different.[35] Defendant has not met this burden or overcome the presumption that his counsel's actions were sound trial strategy.[36]

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper
/s/ Charles L. Levin

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[32] See *Graves, supra* at 486.

[33] *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996).

[34] *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

[35] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[36] See *id.* at 599-600; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).